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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 LYNNE FREEMAN,

4 Plaintiff,

5 v.

22 CV 2435 (LLS)(SN)  
Telephone Conference

6 TRACY DEEBE-ELKENANCY, et al.,

7 Defendants.

8 -----x

New York, N.Y.  
December 12, 2022  
3:00 p.m.

9  
10 Before:

11 HON. SARAH NETBURN,

12 Magistrate Judge

13 APPEARANCES

14 CSREEDER PC

15 Attorneys for Plaintiff

16 BY: MARK D. PASSIN

-and-

17 REITLER KAILAS & ROSENBLATT LLC

18 BY: PAUL LICALSI

19 COWEN DEBAETS ABRAHAMS & SHEPPARD LLP

Attorneys for Defendants Tracy Deebes-Elkenaney, Entangled  
Publishing LLC, Holtzbrinck Publishers LLC, and Universal City  
20 Studios LLC

21 BY: BENJAMIN HALPERIN

CeCe COLE

22 KLARIS LAW PLLC

Attorneys for Defendants Prospect Agency LLC and Emily  
23 Sylvan Kim

24 BY: LANCE KOONCE

ZACH PRESS

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1 (The Court and all parties appearing telephonically)

2 THE COURT: This case is Freeman v. Deeks-Elkenaney,  
3 et al. The docket number is 22 CV 2435.

4 Can I ask counsel for plaintiff to state his  
5 appearance?

6 MR. PASSIN: Good afternoon, your Honor. Mark Passin,  
7 for Plaintiff Lynne Freeman, and I have with me Mr. Paul  
8 LiCalsi.

9 Are you there, Paul?

10 MR. LiCALSI: Yes, I am.

11 THE COURT: Thank you.

12 On behalf of Tracy Deeks-Elkenaney and the remaining  
13 defendants?

14 MR. HALPERIN: Good afternoon, your Honor. This is  
15 Ben Halperin. With me, I have CeCe Cole.

16 THE COURT: Thank you.

17 And on behalf of Prospect Agency and Emily Sylvan Kim?

18 MR. KOONCE: Good afternoon, your Honor. Lance  
19 Koonce, with Klaris Law, and I have with me Zach Press.

20 THE COURT: Great. Thank you, all.

21 Let me begin by reminding everybody that we have a  
22 court reporter on the line. What that means, for our purposes,  
23 is that everyone needs to state their name every time they  
24 speak so that the court reporter knows whom to attribute the  
25 statements.

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1 I will give everybody an opportunity to be heard  
2 today, but the parties also need to make sure not to step over  
3 one another because it makes it impossible to make a clean  
4 record. So, please be respectful to one another, and please  
5 speak slowly and clearly when you do speak.

6 We are here on a stack of letters regarding discovery  
7 disputes and related requests to extend the deadline for  
8 discovery. I issued an order earlier last week indicating I  
9 was going to extend the discovery for a reasonable period of  
10 time – and we'll discuss that today, probably at the conclusion  
11 of the proceedings – and I also made some rulings related to  
12 deposition locations. So I'm going to assume that those are  
13 off the table for now.

14 In preparing for today's conference, I've created a  
15 list of issues that I believe are subject to discussions today.

16 I think the primary ones include the issue of texts  
17 and redactions of the texts. There seems to still be some  
18 issue with respect to manuscripts, and I understand that the  
19 plaintiff has a proposal. I wasn't sure I followed the  
20 proposal, but there was a proposal offered.

21 There's a question about the plaintiff's searches and  
22 whether or not those searches were conducted through counsel or  
23 whether the plaintiff, on her own, has conducted searches,  
24 which would be improper. And there are disputes related to  
25 privilege logs, both with respect to what needs to be on it and

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1 where the privilege log cataloging should begin.

2 I think those are the primary issues. I flagged  
3 issues related to the volume of document discovery.  
4 Potentially issues related to 30(b)(6) depositions, it wasn't  
5 clear to me that those issues are ripe for the Court. And then  
6 there's also this open question about plaintiff's interest in  
7 seeking leave to amend the complaint.

8 Let me just begin by asking you, Mr. Passin: Anything  
9 that you think is subject for today's discussion that I haven't  
10 listed?

11 MR. PASSIN: Let me go through, right now, my letters.  
12 Bear with me one second, please.

13 There's the plaintiffs text messages --

14 THE COURT: Sorry, sorry, Mr. Passin, one second.

15 One thing that I didn't say when we were beginning was  
16 that anyone who's not speaking needs to mute their line.  
17 Someone, I think, maybe just joined us, and we have some  
18 background noise. So, unless you're Mr. Passin, your line  
19 should be muted at this point.

20 MR. PASSIN: So, there's the plaintiff's text messages  
21 is an issue. And along with the privilege log, there's also  
22 the date of productions, and then let me look at my other  
23 letter, your Honor.

24 I believe that's it. You know, your Honor, I would  
25 like to make an introductory statement, if I can. If your

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1 Honor doesn't want me to, I understand that as well.

2 THE COURT: Sure. Go ahead.

3 MR. PASSIN: Your Honor, at the last hearing, in  
4 September, I purposely held back and intentionally tried to  
5 avoid criticizing the other side, for a lot of reasons – I  
6 didn't know you at all – not that I know you now, but it's the  
7 second or third hearing – and I'm from California. But,  
8 anyway, I really cannot hold back anymore because it is  
9 certainly prejudicing my client.

10 The other side is very good at writing letters, trying  
11 to obfuscate the issues. They're really very good at that.  
12 But the reality of the situation is that they are not complying  
13 with discovery and doing everything they can so that my client  
14 does not have the documents and information she needs to oppose  
15 the summary judgment or present her case at trial.

16 We've already addressed -- they produced \$40,000, of  
17 which we haven't finished going through them, but, so far,  
18 about half of them are not responsive and I think should have  
19 been pulled prior to production.

20 But let me give you a little example, and these are  
21 just examples, and there's plenty of these. For example, the  
22 other side, Mr. Koonce didn't produce the agency agreement  
23 between my client and his client. He said that was a mistake.  
24 Okay, maybe it was a mistake, if that was just one thing. And  
25 then when I asked for it, he produced it.

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1           Then the other day I find -- and this is how it is.  
2           We have to go through thousands of documents and then determine  
3           what hasn't been produced.

4           Then I noticed they didn't produce Wolff's agency  
5           agreement with Mr. Koonce's clients, and I said to him -- well,  
6           first of all, I thought he told me that didn't exist. He  
7           disagrees with that. Let's not get into a fight over that,  
8           maybe there was a misunderstanding, we'll never resolve that.

9           But then I said: Why didn't you produce it?

10          And he said: Well, I didn't produce it because it  
11          wasn't asked for.

12          I said: What are you talking about? I had a request  
13          for all agreements between Wolff, on the one hand, and any  
14          person on the other hand that are concerning Wolff paying to  
15          the person any money generated from the exploitation of any of  
16          the books in the *Crave* series.

17          His answer was: Well, the agency agreement doesn't  
18          specifically mention the *Crave* books.

19          Well, your Honor, this is an agency agreement that  
20          says we'll pay you 15 percent on all your books. It never  
21          mentions specific books.

22          Then he said: Moreover, it predated 2010. Well, your  
23          Honor made clear the financial documents -- and this would be a  
24          financial document -- has to be included even if they weren't in  
25          the dates.

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1           Then there's the issue of the redactions. They  
2           admitted they redacted over half -- at least one of them, one of  
3           the defendants -- over half the texts they produced, and they  
4           produced a lot of texts. And we have shown examples -- and  
5           that's only the tip of the iceberg. We have many more examples  
6           where Wolff redacted things that Mr. Koonce's clients didn't  
7           redact or -- didn't redact, and you can see they're not about  
8           personal items, and they're not about other unpublished books.  
9           They're about the books at issue. And those are only the ones  
10          that we're able to see because the two parties treated them  
11          differently.

12                 Now, let's talk about the damages --

13                 THE COURT: Sorry, sorry, Mr. Passin. You asked  
14                 permission to make some brief introductory remarks. Is what  
15                 you're saying now part of that, or are you getting into the  
16                 merits of these discovery issues?

17                 MR. PASSIN: No, it's -- some of this -- we're going  
18                 to be back here a lot of times, your Honor, unless something is  
19                 done. Can I give you the last example, which is the damages?

20                 THE COURT: Okay.

21                 MR. PASSIN: Okay. Last time we were here, in  
22                 September, I had sent interrogatories asking for information  
23                 about damages. The other side said we don't want to do that,  
24                 we want to produce documents. I didn't want to do that, but  
25                 your Honor said they could do that.

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1           So, as to Entangled, they -- oh, and you also said  
2 they can't bury them in their document responses. I have  
3 40,000 documents. So for Entangled, I said, where are your  
4 documents amongst the 40,000, and they said that -- their  
5 response was you just need to conduct your own discovery and  
6 find them in your own production because we're not required to  
7 do that for you.

8           Then on MacMillan, they produced a few sales  
9 summaries -- not one financial number is on any of those  
10 summaries -- and then they said, you know, we've changed our  
11 mind, I know we fought with you, with the judge, but we decided  
12 now on MacMillan, we're not going to produce documents, we're  
13 asking to answer the interrogatories. But they didn't answer  
14 the interrogatories; they answered part of the interrogatories.  
15 They didn't answer completely. They didn't tell us, with  
16 respect to the expenses, the source of the revenue, the dates  
17 they received the revenue. Actually, that's the revenue except  
18 by year. Moreover, we also asked for specific documents for  
19 revenues, and they didn't produce them.

20           And I can go on with the other damages. There's  
21 problems with all the damage responses. I won't bore you with  
22 that. All I'm saying is the other side is playing games,  
23 they're trying to prevent us from having what we need to go to  
24 trial, and we're going to be back here again because we haven't  
25 even -- I tried to meet and confer on that, and I was basically



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1 told, we can't really meet and confer until we have this  
2 conference with you, Judge.

3 That's my introduction.

4 THE COURT: Okay.

5 Unless Mr. Halperin or Mr. Koonce feels compelled to  
6 respond, I would prefer to move into the merits of these  
7 discovery disputes, but I think fairness would allow me to give  
8 you an opportunity if you wish to make similar opening remark.

9 MR. HALPERIN: Thanks, your Honor. This is Ben  
10 Halperin, on behalf of the Tracy Wolff defendants.

11 And, no, your Honor, we did not prepare introductory  
12 remarks and don't think it would be productive to do what  
13 Mr. Passin just did. So, we'll move on.

14 THE COURT: Thank you.

15 MR. KOONCE: And, your Honor, this is Lance Koonce,  
16 and we'd like to move to the merits as well.

17 THE COURT: Okay.

18 So, let's move to this issue of the text redactions.  
19 I understand that the defendants have redacted a significant  
20 portion of texts that were produced. It sounds like some of  
21 them are communications between Wolff and Kim, and Kim did not  
22 redact certain portions, so the plaintiff can actually see what  
23 was redacted and what was not redacted.

24 I understand that the defendants have offered either  
25 what they call high-level summaries of the redacted portions or

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1 an inspection by the plaintiff in your office. The plaintiff's  
2 counsel has asked to do an attorney's eyes only inspection, but  
3 doesn't want to have to physically be in counsel's office to do  
4 that.

5 So, I think this is your client, Mr. Halperin. Can I  
6 talk to you about these redactions. The alternative is that I  
7 do an in camera review of some of them, which I'm prepared to  
8 do, but it sounds like your position, as I understand it, is  
9 that Mr. Passin can look at these documents unredacted, you  
10 just prefer he does it physically in your office. Is that  
11 correct?

12 MR. HALPERIN: This is Ben Halperin, your Honor. And,  
13 yes, that is correct. My clients are very sensitive that these  
14 are their personal text messages. There are long chains going  
15 back years. As we stated in our letter, it's different than  
16 with emails where you can kind of produce them one by one.  
17 These are just wide-ranging conversations that, frankly, have  
18 candid information about, for example, their minor children's  
19 health concerns.

20 So, we would consent to Mr. Passin reviewing these  
21 unredacted, but we are not comfortable with turning over copies  
22 of them to plaintiff's side's possession.

23 THE COURT: I'm no technology maven, but isn't it  
24 possible for you to allow Mr. Passin to do a review of these  
25 documents, which I understand, based on what you've just said,

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1 he can look at notwithstanding their sensitive nature? Can't  
2 you just make them available on a shared drive for some  
3 designated period of time and then unavailable, with no ability  
4 to download the document? It would seem to me that the  
5 requirement that he be physically present in order to look at  
6 these documents in this day and age seems like something we  
7 should be able to avoid.

8 MR. HALPERIN: Your Honor, we're happy to look into  
9 that. We would just want to make sure there are protections  
10 against, for example, downloading and taking screenshots, but  
11 if there is, in fact, a way to put them on some sort of online  
12 platform that's secure, that he could look at, but not copy in  
13 any way, I think we would be open to that.

14 THE COURT: Okay. Look, I'm happy to look at a sample  
15 of text redactions. If I were to do that, I would probably ask  
16 the plaintiff to identify ten sections of the text string that  
17 he would like me to look at, and do that in camera. I'm  
18 certainly not going to read thousands of pages of text  
19 messaging, but I will read a sample. But it would seem to me,  
20 given that the defendants' position is not that Mr. Passin  
21 can't look at this, just that you have some concerns, I think  
22 you should be able to come up with a system that allows him to  
23 review, during designated period of time, you can make it  
24 available and then unavailable, with no downloading  
25 possibility, and understanding that it's attorney's eyes only

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1 at this point.

2 MR. HALPERIN: Your Honor, this is Ben Halperin again.

3 That sounds correct with the caveat we would want to  
4 make sure that technology is workable and doable, but that  
5 would be fine.

6 THE COURT: Okay.

7 Again, I'm no tech maven here, but I can't imagine  
8 that Dropbox, for instance, isn't a reliable platform, and you  
9 could just say we're putting it up at 9:00 o'clock today, and  
10 we're taking it down at noon, and if he needs more time, you  
11 can come up with another window when he can access it and not  
12 access it. I would assume that that is workable.

13 MR. HALPERIN: Your Honor, Ben Halperin again.

14 We're happy to work in good faith to make this happen.

15 THE COURT: Okay.

16 I'm --

17 MR. PASSIN: Your Honor, this is Mark Passin.

18 I'll work with them also in good faith. It's going to  
19 be time-consuming because there's a lot.

20 And one other thing, which, when you asked whether  
21 there were other topics, just to put a pin in it, other books  
22 was another topic.

23 THE COURT: Okay.

24 MR. HALPERIN: Your Honor, this is Ben Halperin. If I  
25 can just interject one more time.

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1           This should be reciprocal because Mr. Passin  
2           communicated he's similarly redacted some of his client's  
3           emails for similar reasons. So it should go both ways with  
4           whatever the solution is.

5           THE COURT: Mr. Passin?

6           MR. PASSIN: They should include any emails they  
7           redacted as well.

8           THE COURT: Well, we're starting right now with texts,  
9           which is what was presented to me, not emails.

10          MR. PASSIN: That's all they're talking about, are my  
11          emails.

12          THE COURT: Mr. Halperin, are you referring to -- I  
13          thought there was an issue with respect to plaintiff's texts.  
14          Are you referring to something different?

15          MR. HALPERIN: Let me clarify that, please, your  
16          Honor.

17          So, he redacted emails purportedly to shield highly  
18          sensitive and some irrelevant information. As for the texts,  
19          we don't really know because he hasn't produced any text  
20          messages. So I guess I would propose if he has concerns about  
21          producing the text messages, they be subject to this system  
22          that we're all going to try, and that the redacted emails of  
23          those that were redacted due to the conclusion of sensitive  
24          information, that those be uploaded to it as well.

25          THE COURT: All right.

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1 Any objection, Mr. Passin?

2 MR. PASSIN: All I said is if -- I'm happy to give  
3 them the redacted emails in the same procedure, but I want him  
4 to give me his redacted emails as well.

5 THE COURT: Mr. Halperin, have you and your colleagues  
6 redacted emails for sensitive information or relevance as well?

7 MR. HALPERIN: Your Honor, we have only redacted, in a  
8 couple of instances, credit card information and, like, log-in  
9 info.

10 THE COURT: All right. If that's all it is,  
11 Mr. Passin, then I think that's reasonable, and you don't need  
12 to see --

13 MR. PASSIN: That is fine. I don't want to see their  
14 credit card information.

15 THE COURT: All right.

16 Let's move on now to the issue of manuscripts. I'm a  
17 little confused precisely what the plaintiff is alleging. I  
18 assume that the plaintiff provided some of the defendants with  
19 copies of the manuscript. And I don't know how often that was  
20 updated or if new copies were provided, but certainly you need  
21 to be able to show what your document is, what your original  
22 work is, that you believe is being infringed by the defendants'  
23 works.

24 So, can you identify specifically which work of your  
25 client you believe was infringed?

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1 MR. PASSIN: Yes. Let me explain what happened, your  
2 Honor, because there's a lot of them -- that's the problem -- and  
3 that's why I think we're going to need expert testimony at  
4 trial.

5 But what happened was, my client presented a draft  
6 manuscript to Kim at Prospect, the agent, and then over a  
7 few -- a number of years, she gave them different versions  
8 based on comments made by the agent. So, before we filed this  
9 complaint -- she also gave her notes and chapter outlines and  
10 various things. And she copyrighted all of those, and I think  
11 there may be as many as maybe even 18 registered manuscripts  
12 and notes and chapter outlines. And what we claim is what the  
13 defendants did is they were edited, each of the versions, so  
14 they took portions of these different manuscripts, and that  
15 that's how they committed their infringement. They didn't take  
16 all the material from just one of them; they took various  
17 materials from various of the manuscripts and various of the  
18 notes. And we produced all the deposit copies, and we gave  
19 them the metadata for the deposit copies.

20 Now, what I was suggesting in my email was even though  
21 we have to rely on all of them for copyright purposes, some of  
22 the manuscripts -- obviously a lot of them -- contain duplicate  
23 material. So if we can work out a stipulation where they won't  
24 hold it against us, we can probably limit it to probably six or  
25 seven manuscripts and not all the notes for purposes of them

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1 doing the comparison. But they have to realize we're relying  
2 on all the copyright certificates, but if we give them the list  
3 that we give them, that will be all the material, it's just  
4 duplicate material and some of the other copyright  
5 certificates, so they don't have to go through the process of  
6 doing the comparison on the ones that are just duplicates.

7 So, we could limit that to six or seven, if we can  
8 work out an appropriate stipulation, and certain notes and  
9 synopses and so forth. But we've given them everything we were  
10 required to give them.

11 THE COURT: What type of stipulation are you  
12 contemplating?

13 MR. PASSIN: Well, here's all I'm saying: Because  
14 let's say we copyrighted a manuscript on day one, and then  
15 day -- copyrighted one manuscript and then copyrighted a second  
16 manuscript, it may be only the new material that is  
17 copyrighted, I'm not sure, and there's an argument that it's  
18 only the new material. So I would want a stipulation that even  
19 though, for comparison purposes, we're only using the following  
20 materials, we're relying on all the copyrights, so they can't  
21 say, oh, you didn't rely on one of the copyrights you needed  
22 because the material was originally copyrighted in that  
23 certificate, and that certificate, you should have used.

24 But there won't be any question about the material  
25 we're relying on; we just have to make it clear that they can't



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1 claim, by not using any certain material, we didn't have the  
2 right to copyrights that we're relying on.

3 THE COURT: So, could you provide to the defendants a  
4 list of the six or so manuscripts that you would rely on, and a  
5 proposed stipulation?

6 MR. PASSIN: Yes, I can do that. And when I say six  
7 or seven, I've got to talk to my client, but I think that's a  
8 good estimate, but it will also be, don't forget, notes,  
9 various notes, and chapter outlines and things like that.

10 THE COURT: So, it's six or seven manuscripts, plus  
11 notes, plus chapter outlines?

12 MR. PASSIN: And things like that. I'm not giving  
13 synopses. I have to look at the -- I have to talk to my client  
14 to state, in fact, what it is, but we can definitely reduce the  
15 number that they currently have if we can work out the proper  
16 stipulation.

17 THE COURT: Mr. Halperin, what do you think about that  
18 proposal?

19 MR. HALPERIN: Thanks, your Honor. This is Ben  
20 Halperin.

21 I'm not entirely sure I understand what Mr. Passin's  
22 point is about the copyright registrations. I think what he's  
23 saying is that he doesn't want us to run a comparison and then  
24 say, oh, but this wasn't in a registration or something like  
25 that. I don't think we're anywhere near that issue right now,

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1 so I'm going to put that aside.

2 As to the six or seven stipulation that he proposes,  
3 I, frankly, think that's too many on both summary judgment and  
4 at trial, if we get there. The *Crave* series, which is right  
5 now five books – well, four of them are in the case – are going  
6 to have to be compared against whatever the plaintiff's work  
7 is. And these are long books. I think the *Crave* books are  
8 around 600, 700 pages, the manuscripts are hundreds of pages.  
9 To compare it to six or seven different versions of the same  
10 manuscript, together with notes and character outlines – it's  
11 unclear to me whether or not Mr. Passin is going to include  
12 those in the stipulation – just seems unwieldy and unfair in a  
13 case where plaintiff is alleging copyright infringement and  
14 should be able to tell us what the work she thinks was  
15 infringed is.

16 THE COURT: Well, I guess what they're saying is they  
17 think it all is. And I'm not sure that there is a legal basis  
18 to preclude them from saying, well, we had an evolving  
19 manuscript, and, arguably, the defendants picked up this piece  
20 of information from draft one, but then picked up this piece of  
21 information from draft two. I don't think that that is  
22 prohibited under the law. I agree with you, it's unwieldy, but  
23 I'm not sure that it's impermissible.

24 MR. KOONCE: Your Honor, this is Lance Koonce.

25 With due respect, I think there is an issue, under

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1 copyright law, with that description that Mr. Passin gave, of  
2 how they would argue this. Typically, you do have to look at  
3 an underlying work and compare the alleged infringing work with  
4 that underlying work.

5 Now, if there are two versions, you can do that  
6 comparison, of one version against the new work and the second  
7 version against the new work, technically. But I have  
8 litigated cases and looked at the case law on -- you do not get  
9 to pull from your entire oeuvre of works and create something  
10 that never existed and claim infringement because, of course,  
11 the substantial similarity is going to require that there are  
12 either passages that are the same or substantially similar or  
13 elements that, even if unprotectable separately, add up to  
14 something.

15 So, for instance, you can't pull a character from one  
16 book that's described in not very much detail and then a  
17 character from another manuscript and then a plot outline piece  
18 from another one. I don't think you can do that under  
19 copyright -- I mean, that may just be something we have to argue  
20 at summary judgment -- but to Mr. Halperin's point, the  
21 copyright law does anticipate you comparing works to works.  
22 And this becomes so unwieldy, that it's hard to even know how  
23 that gets presented to the Court and resolved, especially here,  
24 where all that the plaintiff -- we urged the plaintiffs to  
25 identify longish passages, meaning a whole sentence, that had

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1 identical or very similar words, and, instead, the kind of  
2 copyright infringement that's being alleged here is scattered  
3 similarity of a phrase like "black jeans" or fused words  
4 together that are common in the genre.

5 So, it makes it so unwieldy, that it's going to be  
6 very difficult. I don't know that I have an answer, although I  
7 guess what I would encourage is that the plaintiff be required,  
8 if it's going to make these kind of arguments, to identify one  
9 or two versions, key versions, so we can do a comparison that  
10 makes sense.

11 THE COURT: Thank you.

12 MR. HALPERIN: Your Honor, this is Ben Halperin.

13 Can I jump in with one additional point, please?

14 THE COURT: Yes.

15 MR. HALPERIN: Thanks.

16 So, Mr. Passin's position, if I understand it, is that  
17 the work kept changing over time, and there would be one  
18 version that was rejected and then new content would be added  
19 to a new version, and all of these were seen, and all of these  
20 were infringed, but I think kind of implicit in the theory is  
21 that there was a lot of content that stayed the same between  
22 these different versions and, I think, evolved.

23 So, if we are going to let him rely on more than one  
24 of them, I would say that plaintiff should have to pick one  
25 main manuscript, here is another version where I added a

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1 chapter about whatever, you know, here is another version where  
2 I added 20 pages about something else, he should have to  
3 identify that as part of the stipulation because the plaintiff  
4 is in the best position to say what all the new stuff is as to  
5 each version.

6 MR. PASSIN: May I be heard, your Honor? It's Mark  
7 Passin.

8 THE COURT: Yes.

9 MR. PASSIN: First of all, you have to understand,  
10 your Honor, it's one book, basically, just different versions  
11 and some scenes were changed a little, some language was  
12 changed a little.

13 This is what the plaintiff did. That's our  
14 contention, okay? They can't complain this is what they did,  
15 all right?

16 Now --

17 THE COURT: I'm sorry, this is what they did?

18 MR. PASSIN: We're claiming that they stole -- they  
19 took bits and pieces from each one of the versions, and now  
20 they can't say that we can't take a deposition if that's what  
21 they did.

22 Now, Mr. Koonce said he had a case that says I can't  
23 do that. I said please send it to me, and he never sent me  
24 anything, all right?

25 And, by the way, that's why I believe we need experts.

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1 This can be easily resolved by experts. I've already -- I had  
2 an expert do it, and they can do it. The expert read the  
3 versions and read the books, and can prepare a report. And I  
4 think because of the complication of them having four books and  
5 us having multiple manuscripts, the only way to do this is  
6 vis-a-vis experts.

7 Asking us to identify a version, they're just trying  
8 to get an advantage. There is no one or two versions that will  
9 capture the majority of the infringements. The 2010 and 2011  
10 are probably the best, those are the keys, but there's a lot of  
11 language in other versions. And they, very disingenuously,  
12 always say they have to designate the 2013 version because they  
13 know the 2013 version is very different from the 2010 and 2011,  
14 and we don't have much material on the 2013 version, but we  
15 really need to rely on all the versions.

16 THE COURT: I guess I don't --

17 MR. PASSIN: I believe that's the only way to go.

18 THE COURT: Mr. Passin, I'm not sure I understand how  
19 you're going to prove your case. You need to be able to say to  
20 the Court or to the jury, here is the work of my client, and  
21 here is the work of the defendants, and look for yourself.

22 So, you need to be able to do that apples-to-apples  
23 comparison, and it sounds like, from what you're saying, is  
24 that it's a little bit more etherial and not quite tethered to  
25 actual works. I don't think that that's fair for this

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1 litigation.

2 MR. PASSIN: But I don't think it's fair that they do  
3 it, and then they say because of the way they committed the  
4 infringement, I'm not allowed to have a case. And that's why I  
5 contend we should have experts, because an expert can do it  
6 easily. I've already had an expert do it.

7 THE COURT: What do you mean "do it"? I don't  
8 understand what you're saying.

9 MR. PASSIN: I've had an expert say, here are our  
10 versions, read them, read the four books, and then write a  
11 report of the similarities.

12 THE COURT: And your expert has prepared that report?

13 MR. PASSIN: Yes.

14 THE COURT: I wonder whether or not it might make  
15 sense for that report to be produced, and the defendants maybe  
16 will have a better sense of what your claims are by looking at  
17 that report now.

18 MR. PASSIN: Well, I'd have to talk to my client about  
19 that.

20 The other thing is we're working on some other  
21 reports, too, that would also be helpful. Because there's a  
22 great deal of similarity of language, we put some in the  
23 complaint, but we're probably going to put a report together  
24 about the similarity of language as well. But I'll talk to my  
25 clients about that, your Honor. I'm happy to do that.

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1 MR. KOONCE: Your Honor, this is Lance Koonce.

2 If I could just make one other point, which is that my  
3 understanding – and I will admit it's not a hundred percent  
4 clear because I don't think it's been made clear to us – of the  
5 many versions of manuscripts and notes that plaintiff has  
6 identified – I think there's 30-some that have been produced –  
7 some of those were created after the time that Ms. Freeman was  
8 an author with the Prospect Agency and some of them were  
9 created before the time that she was an author with the  
10 Prospect Agency.

11 I think the only allegation here in this case that  
12 there was any kind of access is based upon the fact that  
13 Ms. Freeman was an author at the Prospect Agency for  
14 three years or so, and the rest of it is -- because we've now  
15 gone through at least document discovery – I know we've got  
16 depositions to come – but as Mr. Passin, I think, will concede,  
17 there's no documentary evidence whatsoever that other than  
18 Prospect sending a copy, one version of the manuscript, in 2012  
19 or '13 to Entangled at Ms. Freeman's request to ask to be  
20 published by them, to pitch it to them. There's no evidence in  
21 the record of sharing of manuscripts or pieces of manuscripts  
22 or whatever else Mr. Passin is speculating about.

23 So at the very least, I think any of these documents  
24 they claim reliance on in terms of manuscripts that they think  
25 were infringed, surely the ones that Prospect never even



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1 received at any point should not be part of this analysis he  
2 wants to do, and at least we can put it down to just the  
3 manuscripts during a particular period.

4 MR. PASSIN: May I address that, your Honor?

5 THE COURT: One second, please.

6 Mr. Koonce, your client or your codefendants  
7 presumably have the documents that were received from  
8 Ms. Freeman, you have that body of work, correct?

9 MR. KOONCE: We do. I think because of the time that  
10 had passed before this lawsuit was brought, I think on both  
11 sides -- Ms. Freeman's side and -- probably, actually, on all  
12 sides, is not maybe as complete a record as it would have been  
13 if this was four years ago, but we have the manuscript -- we  
14 have a number of versions of manuscripts that Ms. Freeman  
15 provided to Prospect over the course of the time she was an  
16 author there, they seem to align with most of the key drafts,  
17 and we certainly have a copy of the manuscripts that was  
18 current at the time that Prospect sent it as a pitch to  
19 Entangled.

20 THE COURT: Mr. Passin, why isn't that transcript the  
21 key one here, the one that Prospect sent to Entangled?

22 MR. PASSIN: Because that was, according to them, the  
23 2013 version, and by that time, the agent had already had her  
24 make so many changes, that it didn't really resemble the  
25 earlier version.

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1 But we really do believe – and we have do evidence,  
2 okay – the text, there's evidence in the text that they must  
3 have had the books. Moreover, what he seems to ignore is that  
4 Emily Kim, the agent, was instrumental in drafting the book,  
5 which we didn't even know until we started looking at the  
6 documents. She, the one that got all the versions, was  
7 instrumental in drafting the book.

8 And as far as Mr. Koonce saying that we're relying on  
9 versions after, I just tried to comply with discovery. If you  
10 look at the list I gave them of what we're relying on, none of  
11 those manuscripts are after the time she stopped working with  
12 the agents. What we did is -- my client was very upset with  
13 me, to be honest with you, because my client didn't think she  
14 had to produce any versions that she continued to work on or  
15 different books she worked on after March 31, 2021, but I said,  
16 no, we have to produce those. So we produced them, but we did  
17 not include them in the list of books that we're relying on.

18 So, I don't know what Mr. Koonce is talking about when  
19 he said we're relying on books after she stopped working with  
20 the agents. We produced them because I thought we had to, but  
21 we're not relying on them. And that's an issue that I want to  
22 discuss today, as well.

23 THE COURT: Okay.

24 I'm going to have to think about this a little bit  
25 more, but I think I'm going to direct Mr. Passin to provide a

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1 proposed list of the body of work of your client that you  
2 believe were infringed upon, and to be as specific as possible  
3 about how that was, so that the defendants have a sense of the  
4 universe that we're talking about here.

5 MR. PASSIN: When you say "be specific as possible,"  
6 I'm not sure what you mean.

7 THE COURT: Well, if you're saying that a particular  
8 storyline or character development or a particular passage was  
9 listed, I am expecting you to identify that.

10 MR. PASSIN: We'll need a lot of time to do that, your  
11 Honor, and I need experts to help me.

12 MR. HALPERIN: Your Honor, this is Ben Halperin.

13 May I jump in for a moment, please?

14 THE COURT: Please.

15 MR. HALPERIN: So, as I understand it, in the Second  
16 Circuit, the way infringement works is one work is compared to  
17 another, experts don't have a role in that, unlike, for  
18 example, in the Ninth Circuit, where there's a separate expert  
19 granted extrinsic analysis. So while I understand that your  
20 Honor wasn't willing at the last hearing to preclude Mr. Passin  
21 from honoring expert testimony, there's going to be *Daubert*  
22 briefing on this issue if he tries to do it.

23 I think his theory seems to be that it's so  
24 complicated to figure out what was infringed because there's  
25 lots of different words and phrases scattered all over the

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1 place, that he needs an expert to do it, but that's not how you  
2 prove infringement. You read the books, and you compare them.

3 So, I think what your Honor was going for was he could  
4 list six to seven versions, but he should explain, all right,  
5 here's another version, here's the additional stuff I'm  
6 claiming was infringed on top of the last version, here's a  
7 third version, here's the additional section I'm claiming was  
8 infringed, and then we can piece together sort of one master  
9 work to compare everything, but I don't think it would be  
10 productive for him to take, I don't know, weeks, months, at  
11 this point, and put together an expert-oriented approach of  
12 bits and pieces from many different things that isn't even  
13 going to ultimately be useful in addressing infringement at the  
14 end of the day given that at trial, he's just got to put one  
15 work next to another.

16 THE COURT: I'm wondering if it makes sense for the  
17 parties to submit just short letter briefs to me on this issue  
18 and see if I can help illuminate how we're going to proceed.

19 MR. HALPERIN: Ben Halperin.

20 I'm happy to do that, your Honor.

21 MR. PASSIN: Mark Passin.

22 I'm happy to do that.

23 MR. KOONCE: Lance Koonce.

24 I'm happy to as well.

25 THE COURT: All right. I think maybe that is what we

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1 need to do because it sounds like both sides have differing  
2 views on how this case is going to be litigated, but, more  
3 importantly, proved at trial. So, maybe the briefing will help  
4 narrow the issues.

5 We were talking about the manuscripts, and then  
6 Mr. Passin indicated that, in connection with that, there are  
7 other books that you'd like to discuss?

8 MR. PASSIN: Yes, your Honor.

9 THE COURT: Why don't you raise that, Mr. Passin?

10 MR. PASSIN: Look, we also believe that the Defendant  
11 Wolff started copying my client's manuscript and using material  
12 in earlier books, so we believe we'd like to have some  
13 discovery on the earlier books.

14 But besides that, and more importantly, we have claims  
15 against the agent and the agency for fraud, deceit, breach of  
16 fiduciary duty, fraudulent concealment, and breach of contract  
17 for basically taking my client's manuscripts and showing it to  
18 Wolff and possibly others so they could copy it. So, that's  
19 not limited to the claimed series.

20 So, by them saying that we can't have discovery on any  
21 other books by Wolff or by Entangled to show that they took  
22 material from our client's manuscript is depriving us of  
23 discovery certainly we'd be entitled to on those other claims I  
24 just mentioned, and I think the copyright claim, because at  
25 trial, I do intend to show that she started copying gradually,

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1 got away with it, started copying a little more, got away with  
2 it, and then went for the whole thing in her YA book.

3 THE COURT: Do you have specific books that you  
4 believe are the product of that infringement?

5 MR. PASSIN: Yes, we do have some, yes.

6 THE COURT: Which books are those?

7 MR. PASSIN: Well, I'd have to get my client -- the  
8 one I know for sure is *Tempest Rising*, is one. I think our  
9 expert needs to get the rest.

10 THE COURT: Why didn't you bring *Tempest Rising* as  
11 part of this copyright case?

12 MR. PASSIN: Well, because we're not claiming it's  
13 copyright infringement; we're just claiming that they took some  
14 material from there. So it was a gradual process, she started  
15 taking some, and then in her later books, she took enough to be  
16 copyright infringement. Plus we are suing because it's a  
17 violation of those other causes of action. I didn't limit it  
18 to the *Crave* series. I said that the agent disclosed her  
19 manuscript to Wolff and possibly others for the purposes of  
20 copying them and committing copyright infringement. But I  
21 didn't limit it to the *Crave* series.

22 MR. KOONCE: Your Honor, this is Lance Koonce.

23 I've had trouble following this argument, I will  
24 confess. I think I understand it better today than I have in  
25 the letter-writing.

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1 But as I understand what Mr. Passin is saying, it's  
2 that somehow Prospect Agency thought that -- believed that the  
3 manuscripts that Ms. Freeman had provided were so valuable,  
4 that they started broadcasting to multiple of their clients,  
5 including Ms. Wolff, that, oh, you should borrow some language  
6 from these manuscripts, and they weren't enough to add up to  
7 any kind of copyright infringement, but that that's a violation  
8 of Prospect's fiduciary duty or a breach of contract.

9 There is zero evidence whatsoever in the record for  
10 any of this, including with respect to the books that Ms. Wolff  
11 eventually wrote many, many years after Ms. Freeman had been an  
12 author with Prospect. Zero evidence. So the idea that now, as  
13 we're hopefully hitting the end of fact discovery, Mr. Passin  
14 is identifying new books by not just -- presumably it sounds  
15 like not just by Wolff, but books by other authors who were  
16 working with Prospect Agency to allege that Prospect was  
17 providing that kind of information to them. He had no  
18 evidence, no documentary evidence, whatsoever that anything  
19 like that happened with the Wolff books. So the idea that  
20 somehow he now needs discovery of books that aren't part of  
21 this case at this point in time and/or were with other authors  
22 altogether, and he's saying that, ultimately, if they used  
23 them -- I don't even want to sort of give any credence to this  
24 hypothetical argument, but just completely hypothetically, if  
25 you provided -- if they provided something to some other

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1 author, which they didn't, he's not even alleging a legal claim  
2 that that resulted in.

3 I guess he's saying that that would be somehow breach  
4 of fiduciary duty, I don't know. I'm baffled by this, but all  
5 I know is it seems like an attempt to expand discovery further  
6 in this case to other things that were not part of his  
7 complaint to begin with.

8 MR. PASSIN: Your Honor, it's Mark Passin.

9 We'll limit it to the Wolff books.

10 THE COURT: Well, Mr. Passin, the thrust of your  
11 letters to me have been that discovery is burdensome, that  
12 you're a solo practitioner, that you can't take on all the work  
13 here and are feeling snowballed by the defendants. I don't  
14 understand how you intend to take on this additional burden of  
15 looking at all other books, where you haven't alleged any  
16 specific facts about misconduct or breaches of any duties with  
17 respect to any other books. And discovery is not an  
18 opportunity to go searching for a claim. If you don't have a  
19 basis when you file your complaint, I'm not going to allow you  
20 to go rummaging through other books and all of the process that  
21 goes into publishing a book in order to try to locate a claim  
22 that you haven't pled yet.

23 MR. PASSIN: Your Honor, but I did make the claim on  
24 the breach of fiduciary duty and all those claims. How about  
25 if I show you some evidence? I have evidence.



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1 THE COURT: All right. On the record before me, I'm  
2 going to deny any written discovery into the other books than  
3 the *Crave* series at issue in this case.

4 Mr. Passin, if you want to ask Ms. Kim or somebody  
5 else questions that relate to possible breaches of fiduciary  
6 duty beyond the *Crave* series at her deposition, you can ask  
7 those questions, and based on those answers, you may be able to  
8 come back to me and ask for additional discovery, but on the  
9 record before me now, I'm going to deny that request.

10 MR. PASSIN: Okay, your Honor. Thank you.

11 THE COURT: Let's turn to the issue of the plaintiff's  
12 document production.

13 I understand from the defendants that there is a  
14 concern that the plaintiff herself has searched for responsive  
15 documents and produced what she believes is responsive, rather  
16 than either having some sort of search term protocol and/or  
17 having counsel go through the documents.

18 So, Mr. Passin, why don't I begin with you, and you  
19 can tell me how you've collected the documents that are  
20 responsive to the defendants' demands.

21 MR. PASSIN: With respect to the emails, we hired an  
22 i-discovery company, and they uploaded her entire computer and  
23 did the search. The only thing they're complaining about is,  
24 on her computer, she had manuscripts and notes, and those, she  
25 gathered from me, we didn't do a search of her computer, but

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1 that's just like hard copies. I mean, there are hard copy  
2 documents that the other side has to gather, and their client  
3 gets those for them. I thought I only had to do the search of  
4 the emails, okay? She had no incentive not to give -- it's to  
5 her benefit to produce all these documents.

6 But the only thing that we didn't do a search of is  
7 her computer, and we know it's everything, also, because, to be  
8 honest with you, in 2021, we had her computer imaged, and we  
9 have compared it to, and we've produced -- and I know from the  
10 person that's a forensic computer expert, my understanding is  
11 we produced everything.

12 But the fact of the matter is, we did it on the emails  
13 like we thought we had to do, but getting documents off her  
14 computer is the same like them getting hard copies from their  
15 clients.

16 THE COURT: I'm not sure that's exactly true, because  
17 you can do searches on a computer that you can't do of a file.

18 Let me turn to the defendants. I don't know,  
19 Mr. Halperin or Mr. Koonce, who raised the issue of the  
20 non-email document production.

21 MR. KOONCE: Right. This is Lance Koonce.

22 I think we raised this first. So, Ben, you can jump  
23 in if you'd like.

24 But I think the way you framed it, your Honor, is  
25 exactly right. At the last hearing, I think Mr. Passin

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1 disclosed that in doing an email search of his client's  
2 documents, that he had allowed his client to self-select the  
3 emails that she believed were responsive, and your Honor  
4 ordered him to, instead, run search terms on those emails. And  
5 when we were in the course of meeting and conferring on their  
6 production, we learned that in collecting digital material  
7 documents – I mean, it could be manuscripts, but I think the  
8 point is we don't know what else could have been on her  
9 computer besides the emails, that every other type of document  
10 that would have been digitally on her computer – that the  
11 proper way to have identified those materials would also have  
12 been to provide access to folders or files. I think the client  
13 has identified generally where things are located, but it's  
14 really outside counsel's obligations to then do a search,  
15 whether it's -- if it's small enough to go through and search  
16 manually and identify responsive documents or if it's a large  
17 set, do some sort of keyword search to find anything that would  
18 be relevant. And it sounds like, instead, here, Ms. Freeman,  
19 like she did with the emails initially on her computer,  
20 self-identified anything she believed was responsive.

21 THE COURT: Mr. Passin, I think you need to -- if  
22 you've got the imaged computer, you need to run searches on  
23 that image. You can work with your client to identify folders  
24 that are likely to have responsive materials, but I think you  
25 need to, yourself, conduct those searches and then review the

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1 responses to see whether there are documents that are  
2 responsive to the discovery demands.

3 MR. PASSIN: I will do that, your Honor.

4 But what's frustrating about this all is, again, it  
5 looks like I'm not complying, and the fact of the matter is,  
6 Wolff produced texts, that we see a zillion texts are deleted  
7 that were produced by Kim. So, all these things are going on  
8 on the other side, and they're getting away with all this, and  
9 that's what's becoming so frustrating.

10 THE COURT: I don't know what you mean by getting away  
11 with all that. I think earlier in the conference, we discussed  
12 that you were going to be reviewing all those texts.

13 MR. PASSIN: Well, no, but they've also deleted -- I  
14 don't know how I'm going to review those -- Wolff deleted  
15 appears in many texts. How am I going to deal with that?

16 THE COURT: Well, this is the first that I'm hearing  
17 about that.

18 MR. PASSIN: No, it's in my letter, I apologize, your  
19 Honor, but we showed, also, you on one of the exhibits that Kim  
20 produced certain texts, and then if you looked at the texts  
21 produced by Wolff, they're mysteriously not included.

22 THE COURT: Okay. I'm not sure what the application  
23 is.

24 MR. PASSIN: Well, I guess you could order them to  
25 produce all their texts that are responsive. And, to be honest

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1 with you, they'd say we don't have evidence that they shared  
2 the manuscripts. We believe, very strongly, they did share the  
3 manuscripts. If your Honor would order them to produce those  
4 to the extent they had them, if they don't have them, they  
5 don't have them, but if you order it, at least they have a  
6 court order.

7 MR. HALPERIN: Your Honor, Ben Halperin.

8 If I may?

9 THE COURT: Yes.

10 MR. HALPERIN: Thank you.

11 I want to just state for the record that we did not  
12 destroy documents, we are not hiding documents. We produced  
13 everything responsive that exists with the text messages. The  
14 only issue with the redactions, and now there's a potential  
15 solution to that. I think Mr. Passin has repeatedly accused  
16 both sets of defendants of unethical conduct here --

17 MR. PASSIN: I did not accuse you -- I'm not accusing  
18 you of deleting the texts, okay? If that was --

19 THE COURT: Mr. Passin -- Mr. Passin -- I'll remind you  
20 of my admonition when we started this -- I can't have you  
21 interrupt lawyers. It's not fair to the court reporter.

22 MR. PASSIN: Thank you. Sorry.

23 MR. HALPERIN: Your Honor, this is Ben Halperin.

24 I'm basically done. I think the accusations,  
25 respectfully, should stop at this point, and let's move forward

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1 to try to get the issues resolved.

2 THE COURT: Okay.

3 So, Mr. Passin, I need you to conduct a search  
4 yourself, an electronic search, of your client's electronically  
5 stored documents, and you can work with her as to which folders  
6 are likely to have responsive documents, but you need to  
7 conduct that search in the same sort of way that you did the  
8 email search. These electronically stored documents should be  
9 treated similarly.

10 MR. PASSIN: Okay, your Honor. Could you please ask  
11 the -- may I talk?

12 THE COURT: Yes, sir.

13 MR. PASSIN: Can you ask the other side if they did  
14 that?

15 THE COURT: Can I ask the other side if they conducted  
16 an electronic review to produce documents?

17 MR. PASSIN: Of their clients' computers.

18 THE COURT: Of course.

19 Mr. Halperin, did you conduct an electronic review of  
20 your client's information?

21 MR. HALPERIN: Your Honor, our vendor collected  
22 everything pursuant to the way vendors collect documents in  
23 e-discovery, so, yes, using the search terms.

24 THE COURT: Okay. Thank you.

25 Mr. Koonce, I assume the same for you?

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1 MR. KOONCE: Yes, we ran search terms on all the  
2 document repositories that we identified as potentially  
3 relevant document repositories. So, sets of files, those kinds  
4 of things. We did not have our client individually identify  
5 any documents, other than with respect to some of the financial  
6 statements, which is, I think, what Mr. Passin referred to  
7 previously, where we could physically -- he was asking for  
8 documents sufficient to show the revenues earned by Prospect  
9 Agency. So, in those cases, we would specifically go and pull  
10 those financial documents.

11 THE COURT: All right.

12 Let's turn to, I think, what might be the last issue  
13 for document discovery. I'm sensitive to the time -- we've been  
14 going an hour already -- which is with respect to the privilege  
15 log.

16 I understand that the plaintiff stopped logging after  
17 the date on which she bought the book on a theory that any  
18 communications after that date are, I believe, privileged, is  
19 the theory. In subsequent letter communications, Mr. Passin,  
20 you suggested that she might have communicated with advisors or  
21 other people or even forwarded information from lawyers to  
22 advisors or friends. I don't know why those communications  
23 would be privileged. Certainly, communications with lawyers  
24 where she is seeking the advice of counsel would be privileged,  
25 but communications with friends and advisors, unless they were

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1 with lawyers to get legal advice, would not be privileged.

2 MR. PASSIN: May I answer, your Honor?

3 THE COURT: Please.

4 MR. PASSIN: Well, first off, it wasn't on the grounds  
5 of privilege. What I was saying is, your Honor said that the  
6 defendants didn't have to produce anything after February 7th,  
7 after February 6th, because I sent my cease-and-desist letter  
8 on February 7th – and I assume the theory is on relevance – and  
9 I said to you, there may be documents that are very relevant,  
10 they may have said to each other destroy all the documents, and  
11 you said, look, the theme of this case is we're not going to  
12 get every document that's out there, and after you sent the  
13 cease-and-desist letter, they don't have to produce any  
14 documents.

15 So, my client got very angry with me and said, well,  
16 that's not fair. Why do I have to produce any documents after  
17 I discovered the claim on March 31, and then -- first of all,  
18 as far as a privilege log, I don't think they have the right to  
19 know how many lawyers she contacted and their names and how  
20 many experts they contacted and their names.

21 I also think, on the same theory, that they don't have  
22 to produce anything after February 6th, she shouldn't have to  
23 produce anything after March 31. It's the same theory. I  
24 don't understand why they get treated one way and we get  
25 treated another way.



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1           THE COURT: Well, I don't know that they are equal. I  
2 think, oftentimes, the question is when the complaint is filed,  
3 that's often a cutoff date. I don't have a specific  
4 recollection of deciding that the cutoff date should be the  
5 cease-and-desist letter, though it's six weeks' difference  
6 between one and the other. And so, typically, once a complaint  
7 is filed, or when a cease-and-desist letter is submitted,  
8 lawyers are getting involved, and much of the communications  
9 about the issues raised in the cease-and-desist or in the  
10 complaint are issues with or communications with counsel. I  
11 think it's very different to have a communication from your  
12 client to her sister or a friend, after she read the book,  
13 talking about her views about whether this book is like the  
14 book or the manuscript that she wrote.

15           So, I don't think it's an apples-to-apples comparison;  
16 I think it's a question of developing the facts.

17           With respect to your concern about how many lawyers  
18 she contacted, I suppose -- I'm not sure why it really matters,  
19 but I suppose if you're really concerned about that, that you  
20 could just log as a group emails with counsel, so long as it  
21 was just your client and counsel, meaning the privilege wasn't  
22 pierced because a third party was on those communications.

23           With respect to communications your client might have  
24 with experts, I don't know why that would be privileged or why  
25 she would not have to produce those communications.

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1 MR. PASSIN: Because they're consulting experts.

2 THE COURT: Consulting experts?

3 MR. PASSIN: Communications with -- it's all work  
4 product.

5 THE COURT: Well, I guess I'd like to know who these  
6 experts are. I mean, if she's sending it to her best friend  
7 and calling that person an expert, you know -- if it was truly  
8 an expert, someone who could be qualified as an expert at  
9 trial, I suppose you might have an argument there, but to the  
10 extent she's communicating with friends and family or other  
11 people sort of generally in the industry, I don't think that  
12 that's work product in the way that the law recognizes.

13 MR. PASSIN: I really think all of this is irrelevant,  
14 your Honor. What she discusses with third parties about the  
15 claim, it's really not relevant.

16 THE COURT: I'm not sure I agree. If she's talking  
17 about her view of the infringement with her sister, I don't  
18 know why that would not be something that would be  
19 discoverable.

20 MR. PASSIN: Well, then I would like their discovery  
21 up to after February 6th, for the same reason. Your Honor, you  
22 said that it's not a perfect world, and I'm not going to get  
23 it.

24 THE COURT: Okay.

25 The "what about it" just doesn't really work like this

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1 in discovery. So they're really different analyses that we  
2 need to consider. And so once the prospect of litigation is  
3 fully ripened because a lawyer sent a cease-and-desist letter,  
4 those types of communications typically are with counsel, but  
5 before that happens, when a person is musing about whether to  
6 bring a lawsuit with friends or family or whomever, there's  
7 really no basis to withhold that information. I'm not aware of  
8 any ground on which you can withhold communications that your  
9 client made about the case. I'm not saying she did this, but  
10 what if she sent an email to her best friend that said, oh, my  
11 gosh, I just read this book, it's kind of like mine, I think  
12 I'm going to sue them for a billion dollars even though I know  
13 there's no basis, I don't know, that seems like something that  
14 they're entitled to.

15 MR. PASSIN: But that's the exact situation I gave you  
16 after February 6th, and you said I'm not entitled to it. I  
17 said suppose they sent an email that said let's destroy the  
18 documents so they don't know that we ripped them off.

19 THE COURT: Okay, understood.

20 I'm going to direct that you revise your privilege log  
21 to include communications. On the privilege log, you don't  
22 need to include the communications, you just need to make it  
23 clear what the privilege is that you're asserting, that they  
24 can stop on February 7th, 2022 --

25 MR. PASSIN: I believe they stopped February 6th.

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1 THE COURT: Sure. They can stop on February 6, 2022.

2 But you need to log the communications that you're  
3 seeking to withhold, and you need to comply with the local  
4 rules so the log is clear enough, that the Court, if necessary,  
5 and certainly counsel, can evaluate your assertion of  
6 privilege.

7 MR. PASSIN: But I can group together -- how do I  
8 group together the lawyers, your Honor?

9 THE COURT: I would advise you to look at some of the  
10 case law that talks about categorical groupings. If you have  
11 communications, your client to a lawyer, I suppose, depending  
12 on the nature of those communications, you could date them and  
13 indicate lawyer one, lawyer two, but you need to make sure that  
14 if there are other people on those communications, that needs  
15 to be revealed. So, I don't know what your client's  
16 communications looked like.

17 MR. PASSIN: I'll be completely honest. For example,  
18 I know she had a communication with a lawyer, and she sent it  
19 to her father. Do I have to produce that, or can I list her  
20 father, and then we deal with it?

21 THE COURT: You need to log it. If you're going to  
22 claim privilege, I'm not sure what the basis is, because if she  
23 had a privileged communication with a lawyer, and then she  
24 shared it with a third party, that privilege extinguishes.

25 MR. PASSIN: Okay.

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1           Let me ask you one other question because I don't want  
2           it to come back on this issue. After she stopped -- and  
3           Mr. Koonce was even complaining about this -- after she stopped  
4           being represented by the agent, she talked to other people  
5           about maybe modifying that manuscript. I don't think those are  
6           relevant at all. Do I have to produce those?

7           THE COURT: I can't really make a ruling in the  
8           abstract. I'm not quite sure what you're referring to.

9           MR. PASSIN: All right, all right.

10          MR. HALPERIN: Your Honor, this is Ben Halperin.

11          Really quick, I think the solution you just fashioned  
12          sounds fine, that we can start with a privilege log, and then  
13          we can discuss about whether there should be briefing or some  
14          other resolution of these, but I think the swath of documents  
15          that Mr. Passin revealed relating to the manuscripts might be  
16          relevant, and so I think we'd like -- we don't want to prolong  
17          discovery, we don't want to have to go through a big fight  
18          about this, but I think we would like some explanation from him  
19          in an email or her about what these additional documents he  
20          just mentioned are so that we can figure out whether we want to  
21          pursue discovery of them.

22          MR. PASSIN: But then -- all right.

23          Your Honor, may I be heard? They withheld documents  
24          on irrelevancy, and no one has told me what they've withheld.

25          THE COURT: Mr. Halperin, I'm sorry, what exactly are

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1 you seeking?

2 MR. HALPERIN: I think he just stated that after  
3 completing the relationship with Ms. Kim, that she communicated  
4 regarding her manuscripts with other people, and that those  
5 documents haven't been produced. So, those clearly would have  
6 hit on the search terms. They involve her manuscripts. All  
7 the terms that involve the contents of those manuscripts would  
8 have been hit on, and we didn't know about these documents  
9 until right now. So I just want to understand what they are  
10 and why they weren't produced. And to just kind of preview  
11 Mr. Passin's concern, our attorneys did a responsiveness  
12 review, as is common in e-discovery, and we removed  
13 nonresponsive documents that had hit on search terms for any  
14 reason. For instance, because the word "crave" is in the  
15 search terms, and someone might crave a sandwich, for example,  
16 like something like that would have been removed. It is a  
17 good-faith due diligence review of the production, like happens  
18 in any case.

19 MR. PASSIN: May I be heard, your Honor?

20 Burt they've also told me they withheld relevant  
21 documents as well.

22 THE COURT: Okay. Can I understand what it is you're  
23 saying your client has done and that you don't think should be  
24 produced?

25 MR. PASSIN: Oh, me, your Honor, Mark Passin?

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1 THE COURT: Yes.

2 MR. PASSIN: What I asked -- I'm trying to be honest.  
3 What I asked is after she stopped working with the agent at  
4 issue, she, I think, continued to work on the manuscript,  
5 although with someone different, and she would communicate with  
6 people about that manuscript, about maybe making changes to  
7 that manuscript and so forth, which has nothing to do with this  
8 case.

9 THE COURT: Well, as I understand it, your client,  
10 after sending manuscripts and working with the defendants, she  
11 then retained another agent and sent --

12 MR. PASSIN: No, no, I think they were writing  
13 partners, or she may have hired someone to review to look at  
14 her manuscript and give her some ideas.

15 THE COURT: And how do we know that the person that  
16 she sent it to didn't share this information inappropriately?

17 MR. PASSIN: Well, I don't see how that would be  
18 relevant unless they showed it to Ms. Wolff.

19 THE COURT: Exactly.

20 MR. PASSIN: But we're not claiming that, so...

21 THE COURT: I know --

22 MR. KOONCE: It certainly would be relevant to  
23 Prospect if that were true.

24 THE COURT: Right, the claims against Prospect and  
25 Kim, as I understand them, are both breaches of certain duties

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1 and contractual obligations, and that's based on a sort of  
2 theory of opportunity. But to the extent your client was  
3 distributing her manuscript more widely, then the opportunity  
4 shifts.

5 MR. PASSIN: It's a different manuscript was changed,  
6 it's not -- they don't have -- it's a different manuscript,  
7 but, okay, I hear what you're saying.

8 All I'm saying, too, your Honor, is I'm telling you  
9 they told me they withheld, on relevancy, some documents, and  
10 I'm being honest and saying what we withheld. I'd like them to  
11 do the same.

12 THE COURT: Okay.

13 MR. PASSIN: We can meet and confer about it. We can  
14 meet and confer about it.

15 THE COURT: Okay. But, to be clear, I'm not going to  
16 direct the defendants to identify all of the grounds on which  
17 they withheld documents on relevancy. That would be enormously  
18 burdensome. The hypothetical that was just given about craving  
19 a sandwich is a perfect example of that. And so I'm not going  
20 to require either side to identify those documents that they  
21 have withheld because they believe they are irrelevant. I  
22 assume, as officers of the Court, everybody is conducting  
23 themselves appropriately.

24 However, I think documents or communications between  
25 your client and nonparties sharing the very work that you claim



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1 was infringed would be relevant, and so those types of  
2 documents, I think, should be produced.

3 MR. PASSIN: Okay. Thank you, your Honor.

4 THE COURT: All right.

5 I'd like the parties to submit a letter on Friday with  
6 respect to any agreements on the reviewing of the redacted  
7 materials. If the parties can't reach agreement, then I'll do  
8 an in-camera review of a sample of those texts, but I'm hopeful  
9 that the parties can come up with some protocol to allow  
10 plaintiff's counsel to do an attorney's eyes only review of the  
11 redacted text messages sitting in his own office through some  
12 sort of platform. So I'd like a letter on Friday letting me  
13 know either that the parties have reached an agreement or are  
14 otherwise at an impasse, in which case, we'll switch gears, and  
15 I will do an in-camera review of a sample.

16 In addition, I am going to direct that each side  
17 submit a five-page letter for me with respect to the issue  
18 about how plaintiff is going to prove this case, specifically  
19 on what works he's identifying or his client is identifying as  
20 the works that were infringed upon. And it sounds like there  
21 was some colloquy today about the difference between how such  
22 claims are proved in the Second Circuit versus the Ninth  
23 Circuit that may have bearing on how the Court proceeds. So, I  
24 invite the parties to develop those arguments.

25 I'd like that letter filed a week from today.

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1 Any objection to it being filed on the 19th?

2 MR. HALPERIN: Your Honor, Ben Halperin.

3 Can we just possibly have until the end of next week  
4 on that letter in light of some deadlines on some other cases  
5 and since this will require some kind of legal research and  
6 briefing type exercises?

7 THE COURT: Sure. Does the 23rd work for everybody?

8 MR. PASSIN: That's fine, your Honor.

9 MR. HALPERIN: Yes, your Honor.

10 THE COURT: Why don't we set that as also the date by  
11 which the plaintiff is to provide a revised privilege log.

12 It should also be the date by which the plaintiff  
13 produces any new responsive documents, if any, based on an  
14 electronic searching of the plaintiff's computer files.

15 The only other thing on my agenda was the issue of  
16 plaintiff's interest in amending the complaint. As I  
17 understand it, the suggestion is to add a claim of infringement  
18 with respect to a book that was published in 2021, *The Katmere*  
19 *Academy* and with respect to the fifth in the series in the  
20 *Crave* series that I understand was published within the last  
21 month or so.

22 Is that correct, Mr. Passin?

23 MR. PASSIN: Yes. It was published November 8th, your  
24 Honor.

25 THE COURT: So, I guess I have a question about why

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1 you're only raising the 2021 book now. And then my second  
2 question is sort of related to my earlier ruling on discovery.  
3 I still don't see why bringing in another book, particularly at  
4 this late stage, makes sense. If you are right, and you're  
5 able to prove that the defendants infringed your client's works  
6 and violated either contractual or common-law duties, then that  
7 will almost certainly be true as to the fifth book. But given  
8 the sprawling nature of this litigation and the difficulty by  
9 which I think both sides are facing in identifying the  
10 infringements, I don't see the value in expanding the scope of  
11 the works at this stage.

12 Mr. Passin, can you explain to me why this makes  
13 sense?

14 MR. PASSIN: First of all, to answer your first  
15 question about *The Katmere Academy*, we just never knew it  
16 existed. We never saw that it existed.

17 Well, I mean, my client sort of -- my client feels  
18 that they don't want to have to go through this all again, and  
19 they'd like to dispose of it all in one lawsuit.

20 THE COURT: Let me ask you, as her representative: I  
21 understand her sort of emotional desire to be done with it all,  
22 but, legally speaking, why at this stage, what would otherwise  
23 be weeks before the close of fact discovery, why does this make  
24 sense? I guess relatedly, have you been able to identify for  
25 the defendants any specific infringement, or is it just a

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1 continuation of character development?

2 MR. PASSIN: I believe my client has specific  
3 infringement, but I haven't discussed it with the other side.

4 THE COURT: Well, in that case --

5 MR. PASSIN: To answer your question, your Honor, we  
6 haven't taken depositions yet, and we haven't had that much  
7 time for discovery. Remember, I didn't get the documents until  
8 October 21, and it's only -- it's not even two months.

9 THE COURT: All right.

10 Well, I think before you're going to file any motion  
11 for leave to amend, you should provide the defendants with a  
12 proposed amended complaint. That will certainly be something  
13 that you will need to submit if you're going to make a motion  
14 for leave to amend your complaint. And so, if you are set on  
15 proceeding in that way, I would suggest that you first get a  
16 draft proposed amended complaint to the defendants, and based  
17 on that, you can meet and confer on whether or not the  
18 defendants would consent to the amendments.

19 Again, I don't know exactly whether or not -- it  
20 sounds like you don't necessarily either -- whether or not  
21 you're saying there's specific passages that you believe were  
22 listed or whether or not it's just a continuation of character  
23 development, but I think that's something that needs to be  
24 shared with the defendants because, depending on what your  
25 theory is, it could radically expand the scope of discovery at

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1 a late stage in the lawsuit.

2 MR. PASSIN: Okay, your Honor.

3 And, your Honor, there's another part to that, which  
4 is: The other side is producing versions of my client's  
5 manuscript that she no longer has, and she needs to review  
6 those to see if there are infringed passages in those that she  
7 didn't have in the manuscripts in her possession. And if  
8 that's the case, she needs to add additional manuscripts that  
9 she claims have been infringed. But she needs a couple of more  
10 weeks to go through all the manuscripts they produced to see  
11 which ones she had and which ones she didn't have and if  
12 there's any additional material in there that has been  
13 infringed.

14 THE COURT: Is there an application to the Court?

15 MR. PASSIN: I mean, that was mentioned in the letters  
16 as part of the amendment – she needs to add possibly new  
17 material that's been infringed, but she has to review the  
18 material that's been produced by the other side.

19 THE COURT: Okay.

20 The filing of a complaint and amending, it can't be an  
21 iterative process. So, again, I'll just say, I'd like your  
22 client to expeditiously review whatever material she needs to  
23 review, and for you, if you're going to move forward on  
24 amending the complaint, to send the defendants a proposed draft  
25 amended complaint, and for the parties to have a

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1 meet-and-confer, and if the parties can't reach an agreement on  
2 that amendment, then the plaintiff should file a motion for  
3 leave to amend. I'm going to continue to move the case forward  
4 regardless, and I will just leave it to the plaintiff to file  
5 that motion at the appropriate time. But because that motion  
6 will necessarily have to have a draft amended complaint, the  
7 first thing you need to do is submit that draft amended  
8 complaint to the defendants and then have a meet-and-confer  
9 with them about what you're seeking to amend.

10 Okay?

11 MR. PASSIN: That's fine, your Honor.

12 And, your Honor, I apologize if I was a little too  
13 aggressive on that. It's very important to my client. She  
14 felt it was unfair, but I apologize if I was arguing too  
15 strenuously on that.

16 THE COURT: That's fine.

17 So just to recap:

18 On Friday, I'm going to get a letter from the parties  
19 letting me know, hopefully, that they have reached an agreement  
20 on the attorney's eyes only review of the unredacted text  
21 messages. If not, then we'll move forward with an in-camera  
22 review of sampling.

23 By December 23rd, I'm going to receive simultaneous  
24 five-page letter briefs regarding the type -- just to be clear,  
25 the types of briefs I'm looking for are to help the Court

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1 manage discovery, so to help me understand how this case is  
2 going to be tried and what sort of evidence is going to be  
3 relied upon, and that will help me further evaluate this issue  
4 with respect to plaintiff's more sweeping claims of infringing  
5 works and whether or not they need to be narrowed to a  
6 particular body of work.

7 In addition, by February 23rd, the plaintiff is to  
8 produce a revised privilege log and those documents that were  
9 generated by an electronic searching of the plaintiff's  
10 computer files and a production of those documents.

11 I'm not going to require anybody to state why they  
12 didn't submit relevant documents, but, as I indicated, based on  
13 the information presented to me today, I think that  
14 communications that Ms. Freeman had with subsequent people  
15 after her relationship with the Prospect Agency ended, but with  
16 respect to the same infringing works that she's claiming the  
17 defendants infringed, that those would be relevant  
18 communications subject to production.

19 So, the very last thing -- and then I'll let the court  
20 reporter go, for whom I know it's been a long day -- is the  
21 discovery deadlines.

22 Given all of this information and the holidays, I  
23 don't expect there to be -- I imagine there won't be  
24 depositions this month and there's going to be additional  
25 documents exchanged towards the end of the month. Mr. Passin

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1 has indicated that he thinks it's going to take until the end  
2 of January to review the documents that have been produced to  
3 date. In light of that and the 12 or more depositions that I  
4 think the parties anticipate taking, I'm inclined to extend the  
5 discovery deadline until the end of February. I think that  
6 that's generous and allows the parties to get through what they  
7 need to get through.

8 Any objections to that?

9 MR. HALPERIN: Your Honor, Ben Halperin --

10 MR. PASSIN: This is Mark Passin.

11 Could we have until the middle of March? Because if  
12 I'm not going to get through until the end of January, that  
13 gives us one month to take all those depositions.

14 THE COURT: Mr. Halperin?

15 MR. HALPERIN: Your Honor, I'd like to be heard on  
16 this, if you don't mind. And I realize it's the end of the  
17 day, and I apologize to your Honor and the court reporter for  
18 the length of the call.

19 We do object to that. A recurrent theme in  
20 plaintiff's letter is that the defendants somehow acted  
21 improperly in not producing documents until October 21st.  
22 October 21st was the Court's deadline for production, so we did  
23 nothing improper.

24 I think what we're seeing here is a plaintiff who got  
25 40,000 documents, which is not an unreasonable amount in a case



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1 of this scope, and didn't have the resources to review them.

2 Now, we understand your Honor is going to grant a  
3 discovery extension, but the reason for that should be that at  
4 this stage of December, with the holidays, it's just not  
5 feasible to get all these depositions in, but I think all those  
6 depositions can happen in January, and the end of January  
7 should be sufficient for that.

8 The other point is that this extension should not be  
9 used by Mr. Passin to propound additional written discovery or  
10 issue new subpoenas. This should be a matter of finishing up  
11 the review of documents and finishing these depositions so that  
12 the parties can move on with the case and we can move to  
13 summary judgment. We should not be using this as a way to  
14 further expand the scope of discovery in any way. He indicated  
15 twice in his letter, that was dated December 6th, I think at  
16 1:00 a.m. December 7th, that he intends to issue new written  
17 discovery requests after he's reviewed all the documents. I  
18 think we should put a stop to that at this point. Let's get  
19 his review done — he needs more time because he's one guy doing  
20 it, we get it — but let's get these depositions finished so we  
21 can move on, and we'd request that ends January 31st.

22 MR. KOONCE: I'd like to be heard. This is Lance  
23 Koonce.

24 I would just reiterate what Mr. Halperin said. I  
25 would say just two other things, which is:

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1           My client, Prospect Agency, is my client, and Emily  
2 Kim, it's a very, very small firm, and they've been counting on  
3 this discovery concluding quickly and efficiently because this,  
4 for them, they're going to have spent the money that they  
5 earned on this book. We will be seeking prevailing party  
6 attorneys' fees in this case, but it's a huge burden on these  
7 small entities.

8           The other thing I'd say is that even though Mr. Passin  
9 complains about receiving 40,000 documents and that some of  
10 them are nonresponsive, we, at the last hearing, and also in  
11 meet-and-confers, pleaded with Mr. Passin to identify longer  
12 search strings, not one or two or three words here or there,  
13 because at the same time that he was seeking for us to produce  
14 responsive documents, the complaint here is that, oh, you might  
15 be hiding something, that you could be burying messages to  
16 Ms. Wolff somewhere, so we needed to be as inclusive or even  
17 overinclusive as possible, because we're trying to prove a  
18 negative that no manuscript, no pieces of manuscripts, were  
19 sent to anyone here. We described that process at the last  
20 hearing, and your Honor, I think, encouraged Mr. Passin to  
21 provide narrower search terms.

22           So, to the extent he's got more documents than he  
23 wanted, we weren't trying to bury him; it was exactly the  
24 opposite, we were trying to find ways to provide narrower  
25 terms, but he did bring that on himself by insisting on these

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1 broad search terms.

2 And he's now complaining that we, instead, after he  
3 insisted on broad search terms, should have reviewed tens of  
4 thousands of documents individually. We did run our own  
5 filters, and we did pull out a significant amount of  
6 nonresponsive documents, like communications with other clients  
7 of Prospect and contracts with them, but I think we would love  
8 to see this discovery period end as soon as reasonably possible  
9 and not be expanded because this costs a small firm like my  
10 client's firm an inordinate amount of money every month that  
11 this discovery goes on.

12 MR. PASSIN: Your Honor, may I be heard?

13 THE COURT: Briefly.

14 MR. PASSIN: All right.

15 First of all, again, they're trying to make me sound  
16 like the bad guy. I just got written interrogatory responses  
17 from them yesterday that I served in June. I still don't have  
18 responsive documents about damages, all of them. And I still  
19 need to take some written discovery. It won't be voluminous.  
20 And I need to maybe serve some subpoenas.

21 THE COURT: Okay. Thank you.

22 I'll just begin by saying granting an extension of  
23 discovery is not because I view the defendants as having been  
24 dilatory. My review of the production so far and the court  
25 docket suggest that they have been producing documents

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1 appropriately.

2 If I had a quarter for every time one party wanted  
3 expansive discovery search terms and then complained about  
4 those voluminous documents, I'd be a rich person, so it's not  
5 surprising to me that we find ourselves with a high volume of  
6 documents, maybe some of which are less responsive than we  
7 would have wanted.

8 I recognize that Mr. Passin is handling this case, it  
9 sounds like, on his own, or largely on his own, and I think, in  
10 fairness to the defendants, there's a need to clarify exactly  
11 the scope of what is being alleged, which is why we're going to  
12 have those letter briefs submitted essentially the day before  
13 Christmas. And I don't intend on reading them on Christmas  
14 Eve, so I wouldn't assume that I'm going to be getting my  
15 resolution of that issue out right away, and I think that's  
16 going to affect, potentially, the way the case is going to  
17 proceed from there on out.

18 So I'm going to extend the discovery deadline until  
19 March 15th.

20 With respect to additional discovery demands, I'm not  
21 going to make an advisory ruling, Mr. Passin. I expect you to  
22 be conducting yourself in a way that is efficient and not  
23 serving discovery demands that are broad and expansive without  
24 any foundation.

25 So, you've already served a number of discovery

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1 demands, as I understand it. I'm not going to preclude you  
2 from having follow-up discovery demands, but I expect that they  
3 will be narrowly tailored to information that you have received  
4 as a result of those first round of discovery demands.

5 The March 15th date is a real date, so that date will  
6 not be extended, so the parties should conduct themselves as  
7 such. Certainly, if the defendants want to move forward with  
8 their depositions in January, there is nothing that stops them  
9 from doing that, but I think that fairness necessitates  
10 extending it to the 15th of March.

11 MR. PASSIN: Thank you, your Honor.

12 THE COURT: Anything further?

13 MR. KOONCE: Just one quick clarification on your  
14 prior order. You indicated that depositions would be held --  
15 could be held either remotely or in the state where the witness  
16 was located.

17 Two of the individuals that were in the list of  
18 deponents here from plaintiff are non -- they're third-party  
19 witnesses, they're former employees of Prospect Agency, and it  
20 wasn't clear to me from the order, your Honor, whether the  
21 ability of plaintiff to take those depositions in person  
22 extended to those third parties. They would prefer remote  
23 depositions, but I just mainly wanted clarification that that  
24 order extended to third parties as well as -- where the burden  
25 is a slightly different analysis than the party witnesses.

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1 THE COURT: It does.

2 MR. HALPERIN: Okay. Thank you, your Honor.

3 THE COURT: All right.

4 Thank you to our court reporter for staying on so  
5 long. I apologize.

6 Thank you to everyone else, and I will look out for  
7 that first letter at the end of the week. We're adjourned.

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